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Supreme Court, U.S.
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No. 00-1270

IN THE

Supreme Court of the United States

CHRISTINE BERKLEY, individually and on behalf of all persons similarly situated,
Petitioner,

v.

H&R BLOCK EASTERN TAX SERVICES, INC.,
Respondent.

On Petition for Writ of Certiorari to the Tennessee Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When a state court referring a matter to arbitration explicitly retains jurisdiction over the controversy, does this Court have jurisdiction to review the decision under 28 U.S.C. § 1257(a), which confers jurisdiction only over "final judgments and decrees" of state courts?

2. Does the petition present a viable cause of action inasmuch as petitioner's claims have been settled and released by a federal judgment approving a nationwide class action settlement from which she did not opt out?

3. Did the court below, in accordance with *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), correctly enforce the parties' agreement to submit the issue of arbitrability to the arbitrator?

4. Should this Court concern itself with the interplay between the Federal Arbitration Act and policies of Tennessee state law when the opinion of the Tennessee Court of Appeals does not address that issue?

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CORPORATE DISCLOSURE STATEMENT

Respondent H&R Block Eastern Tax Services, Inc. ("Block"), is a wholly-owned subsidiary of H&R Block Services, Inc., which is a wholly-owned subsidiary of H&R Block Group, Inc., which is a wholly-owned subsidiary of H&R Block, Inc. H&R Block, Inc. is publicly traded on the New York Stock Exchange under the symbol "HRB."

STATEMENT OF JURISDICTION

There are two jurisdictional bars to the grant of certiorari. First, the Tennessee Court of Appeals' decision is not a final judgment. Second, petitioner's case is barred by *res judicata* because she did not opt out of a nationwide class-action settlement that compromised her claims.

A. There Is No Final Judgment.

Rather than dismiss this action in favor of arbitration, the Tennessee Court of Appeals explicitly retained the trial court's jurisdiction over this matter during the arbitration proceedings. The opinion concluded: "the cause [is] remanded with instructions to order the parties to arbitrate the validity and enforcement of the arbitration clause. If the arbitrator finds the clause not enforceable, the Court will proceed to resolve the disputes between the parties. If the arbitrator determines that the arbitration clause is enforceable, then the parties will be required to arbitrate all issues covered by the arbitration agreement." Pet. Apdx 8a-9a.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review final judgments of state courts which stand as "an effective determination of the litigation and not

merely interlocutory or intermediate steps therein. It must be 'the final word of a final court.'" *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997), *quoting Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). Here, there has been no final disposition on the merits of either the litigation or the question of arbitrability, and thus there is no final judgment capable of review in this Court.

This case is critically different from *Green Tree Financial Corp. v. Randolph*, 121 S.Ct. 513, 519-20 (2000), in which the Court found that an order directing the parties to arbitration and *dismissing the case with prejudice* was a final order "leaving the court nothing to do but execute the judgment." Here, the Tennessee Court of Appeals has directed the parties to arbitrate the preliminary issue of arbitrability (as they had agreed) and then to return to the court if the arbitrator determines the clause is not enforceable. Under Tennessee practice, the court retains jurisdiction and stays, rather than dismisses, cases subject to arbitration.[1] The decision below did not effectively terminate this litigation, and under Section 16 of the Federal Arbitration Act, 9 U.S.C. § 16, the decision is therefore "interlocutory." Accordingly, this is not a final judgment in any sense of the term, and the Court lacks jurisdiction under 28 U.S.C. § 1257(a).

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[1] *See* Tenn. Code Ann. § 29-5-303(d): "Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay."

B. Petitioner's Case is Barred by *Res Judicata*.

The petition does not present a viable case because petitioner's claims against respondent have been settled. Petitioner's individual and class claims were subsumed in a nationwide class action settlement approved by the Honorable James B. Zagel of the United States District Court for the Northern District of Illinois in *Zawikowski v. Beneficial National Bank*, Case Nos. 98-C-2178 and 98-C-2330.[2] The *Zawikowski* court has entered judgment approving settlement of the claims of a nationwide class of customers against the defendants, including respondent, arising out of Refund Anticipation Loan ("RAL") transactions occurring in the years 1987-99. Petitioner has alleged that she received a RAL in the years 1994-97 and is attempting to assert various claims against respondent under Tennessee law based upon her RAL transaction. Pet. Apdx 2a, 5a.

The *Zawikowski* settlement was preliminarily approved on January 5, 2000, and, following notice to the class and hearings on the adequacy of the settlement, a final judgment approving the settlement was entered on February 16, 2001. Absent a reversal of the judgment entered in the Northern District of Illinois, petitioner's claims have been released. She did not opt out of the settlement class, has not moved to intervene in the *Zawikowski* proceedings, and has not sought a stay or other relief from the settlement in any court. Accordingly, the claims she purports to assert in this action are barred by principles of *res judicata*, and the questions supposedly presented by the petition are not live issues.

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[2] An earlier order in that case discusses the history of the RAL litigation and the settlement terms. *Zawikowski v. Beneficial National Bank*, 2000 WL 1051879 (N.D. Ill. 2000).

COUNTER-STATEMENT OF THE CASE

Petitioner Christine Berkley asks this Court to review the decision of the Tennessee Court of Appeals at Knoxville enforcing a written arbitration agreement that she signed. Pet. Apdx 1a-9a. She agreed to arbitration as a condition of receiving a short-term loan — the RAL — for which her anticipated federal income tax refund served as collateral. She later sued Block on various state law theories and demanded damages not to exceed $74,000. After the trial court denied Block's motion to compel arbitration, the Tennessee Court of Appeals granted an interlocutory appeal and reversed.

There is no dispute that this is a transaction in interstate commerce or that petitioner's substantive claims are within the scope of the arbitration clause. There is no dispute that petitioner signed the written contract containing the arbitration clause. Pet. Apdx 2a. The Tennessee Court of Appeals stated the question before it as, "whether the contract signed by the parties containing an arbitration agreement is enforceable." *Id.* at 1a.

The written agreement of the parties expressly required arbitration of "any claim or dispute (whether in contract, tort or otherwise) in any way relating to the Agreements or relating to the relationships of such parties *including the validity or enforceability of this arbitration provision* or any part thereof." *Id.* at 3a (emphasis added). Finding the case to be controlled by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, (the "FAA"), the court, citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), concluded: "Because the contract specifically states

that the parties agreed to arbitrate the question of the validity or enforceability of the arbitration agreement, and because the choice of law clause states that Federal law and Delaware law apply, the parties must submit the question of arbitration to arbitration." Pet. Apdx 8a. The Court of Appeals remanded to the trial court with directions to order arbitration as to the validity and enforcement of the arbitration clause.

The appellate court expressly relied upon the decision of the Tennessee Supreme Court in *Frizzell Construction Co. Inc. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (Tenn. 1999), *cert. denied*, 120 S.Ct. 2679 (2000), as its basis for applying the FAA as the controlling law. The court made no finding that any Tennessee statute was in conflict with the FAA, nor did it purport to restrict or expand upon the operation of the FAA. The Tennessee Supreme Court denied petitioner's request for further review without comment. Pet. Apdx 15a.

In seeking review in this Court, petitioner relies upon three manifest distortions of the record below. First, at page 6 of the petition, she claims that she "was unaware of the arbitration clause and was not informed of its existence." This factual claim is expressly refuted by the record and was rejected by the Tennessee Court of Appeals. Petitioner submitted her affidavit acknowledging her signature on the written agreement containing the arbitration clause. The arbitration clause was not buried in the document; it was segregated in its own, clearly labeled section, including an explicit statement in bold text that the parties, "*hereby waive their rights to litigate such claims in court*." Pet. Apdx 4a. Immediately above petitioner's signature, the agreement contains her representation that:

> **"I acknowledge that I have read, understand, and agree to . . . the disclosures above and on the reverse side of this Loan Application form including . . . Section 7 relating to arbitration."**

Likewise, immediately below petitioner's signature line was the following instruction in capital letters and bold print:

> **"DO NOT SIGN THIS LOAN APPLICATION UNTIL YOU HAVE READ THE IMPORTANT INFORMATION ABOVE AND ON THE REVERSE SIDE."**

Petitioner's claim that she never "agreed" to arbitrate is not based upon any objective manifestation of such disagreement but is nothing more than an attempted repudiation of her signature on the document. The Tennessee Court of Appeals found the existence of a written contract to arbitrate in accordance with the well-accepted rule that a party will not be permitted to disclaim her written declarations.

Second, petitioner's assertion that she has met her burden of producing evidence to support her unconscionability argument is totally baseless. She did not introduce any evidence in the Tennessee courts of what her costs would be if she proceeded in the forum selected by the agreement, the National Arbitration Forum (NAF). In the trial court, petitioner based her unconscionability arguments on her counsel's statement of the cost of proceeding under the American Arbitration Association Commercial Arbitration Rules and complained that in opposing arbitration she did not know what the NAF costs would be. (Opposition to Motion to Compel Arbitration at p. 1, n.3.) Petitioner's "evidence"

concerning the cost of proceedings before the National Arbitration Forum is nothing more than her counsel's speculation based upon the incomplete, and extra-record, excerpt from the NAF rules which are attached to her petition. Pet. Apdx 26a-37a.

Third, although petitioner bases much of her second argument upon the alleged unavailability of injunctive relief in an arbitration proceeding, her operative pleading contains no prayer for injunctive or declaratory relief. Pet. Apdx 5a. She did not attempt to add any claim for such relief until the days immediately preceding the hearing on the motion to compel arbitration. The trial court did not grant petitioner leave to add those claims. Pet. Apdx 11a-13a.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S CONTENTION THAT ARBITRABILITY CANNOT BE DECIDED BY THE ARBITRATOR IS SQUARELY FORECLOSED BY *FIRST OPTIONS OF CHICAGO, INC. V. KAPLAN*, 514 U.S. 938 (1995).

The nub of petitioner's plea to this Court is based on the notion that she has an inalienable right under the FAA to have the issue of arbitrability decided by a Tennessee state court, rather than an arbitrator. That argument ignores the very terms of the arbitration agreement she signed, which plainly required her to arbitrate all claims relating to the agreement or the relationship of the parties "*including* the validity or enforceability of this arbitration provision or any part thereof."

As correctly observed by the Tennessee court, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943

(1995), specifically held that "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." The *First Options* Court cited *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649 (1986), and *Steelworkers v. Warrior & Gulf Nav. Co.*, 383 U.S. 574, 583 n. 7 (1960), for the proposition that the "parties may agree to arbitrate arbitrability." Hence, in light of the contractual language, petitioner's invocation of the FAA to justify her claim to a judicial determination of arbitrability is spurious.

Nor can petitioner avoid her written obligations by arguing that she did not read the document and did not understand she was signing an arbitration agreement. The existence of an agreement to arbitrate is determined by application of "ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. Petitioner's claim that her written agreement is subordinate to her subjective intent is a claim of unilateral mistake, a claim that is not legally sufficient to abrogate a signed contract under Tennessee law. *Bill Walker & Assoc., Inc. v. Parrish*, 770 S.W.2d 764, 770 (Tenn. App. 1989), *appeal denied*. The Tennessee court did not err in enforcing petitioner's signed contract to arbitrate "the validity or enforceability of this arbitration provision."

Wholly apart from the jurisdictional impediments to this petition, petitioner's FAA claim is directly at odds with controlling precedent from this Court.

II. THIS COURT SHOULD NOT REVIEW QUESTIONS OF TENNESSEE LAW THAT WERE NOT ADDRESSED BY THE COURT BELOW.

The petition's second and third Questions Presented both raise issues of Tennessee law that are not only unsuitable for review by this Court, but were not discussed in the opinion of the Tennessee Court of Appeals. This Court does not ordinarily grant review to consider issues not discussed by the court below. *Perry v. Thomas*, 482 U.S. 483, 492 (1987); *Street v. New York*, 394 U.S. 576, 582 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945).

1. Even assuming that the alleged "conflict" between the FAA and the Tennessee Consumer Protection Act ("TCPA") was ruled *sub silento* below, such a ruling was entirely consistent with the decisions of this Court. Petitioner's claim that the FAA should yield because it is in "inherent conflict" with her rights as a "private attorney general" under the TCPA does not present an important question of unsettled law but in fact has consistently been rejected by this Court.

This Court has acknowledged a hypothetical possibility (yet to be found to exist) that *Congress* could create a statutory cause of action that was in such inherent conflict with the FAA that the FAA must yield. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-29 (1991) Petitioner's "private attorney general" argument against arbitration exists only as a subspecies of this "inherent conflict" theory. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 239-42 (1987).

Petitioner's attempt to construct a conflict between the TCPA and the FAA collides headlong with, and loses

to, the Supremacy Clause of the United States Constitution. The FAA does not yield to inconsistent state statutes, even those which explicitly purport to forbid arbitration of claims arising under the state remedial program. In *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), this Court addressed a California franchisee protection statute that contained a broad anti-waiver provision similar to the TCPA's. This Court held that the Supremacy Clause forbids application of the anti-waiver provision to void an arbitration agreement governed by the FAA. *Id.* at 16. *See also Perry v. Thomas*, 482 U.S. at 490-91 (striking down a later California statute which specifically prohibited arbitration). This Court rejected a request to overturn *Southland* in *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 272 (1995).

Petitioner's related argument that she can avoid arbitration because she seeks declaratory and injunctive relief suffers the same fate because it is based upon an imagined shortcoming in the fundamental nature of arbitration. *Perry v. Thomas*, 482 U.S. at 492, n. 9. Even so, the argument is based upon two false premises. First, there is nothing in agreement which prevents the award of such relief. *Gilmer*, 500 U.S. at 20. Second, petitioner's operative pleading contains no prayer for injunctive or declaratory relief. Pet. Apdx 5a.

Even had petitioner established the existence of a true conflict, her claim that the FAA must yield to the TCPA is contrary to well-settled law and provides no basis for review by this Court.

2. Petitioner's third Question Presented raises the issue of "unconscionability" under "applicable Tennessee law" (Pet. at i). Again, this is a state law question

neither addressed nor decided by the Tennessee Court of Appeals. As such, it does not meet any of the requirements for review by this Court.

Petitioner's "unconscionability" argument is likewise devoid of merit. Her assertion that the "prohibitive cost" of arbitration would pose an insuperable obstacle has no basis in the record. The arbitration rules attached in Appendix E to her petition were not admitted into evidence in the lower courts and, moreover, are incomplete in that they omit provisions which would permit her to shift costs or avoid them altogether. As in *Green Tree Financial*, petitioner's argument based on the costs of arbitration is utterly speculative. 121 S.Ct. at 522.

Petitioner's complaints that she will be precluded from her state-law class action rights and trial by jury are also insufficient to overcome her agreement to arbitrate. This Court has ruled both issues in the federal context in *Gilmer*, 500 U.S. at 32, and has observed otherwise that the right to a jury trial is waivable. *See Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986). Indeed, every agreement to arbitrate by definition waives the right to a jury.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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